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IN THE COURT OF APPEALS OF INDIANA

B.R.M.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 58A05-0610-JV-566
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE OHIO CIRCUIT COURT
The Honorable James D. Humphrey, Judge
Cause No. 58C01-0606-JD-18

May 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent B.R.M. appeals from the juvenile court's order finding him to be a delinquent child for committing an act that would have been Aggravated Battery,[1] a class B felony, and Battery Resulting in Serious Bodily Injury,[2] a class C felony, had it been committed by an adult. B.R.M. argues that there is insufficient evidence supporting the finding of delinquency and that the juvenile court erred in ordering that B.R.M. be made a ward of the Department of Correction (DOC) for housing in a correctional facility for children.

We find, sua sponte, that finding B.R.M. to be delinquent for aggravated battery and battery resulting in serious bodily injury based on the same incident violates the principle of double jeopardy. Thus, we reverse the judgment of the juvenile court in part and direct it to vacate the finding of battery resulting in serious bodily injury. We also find, sua sponte, that the juvenile court relied, in part, on the incorrect statute in awarding wardship of B.R.M. to the DOC. Consequently, we reverse the judgment in part and remand with instructions to amend the dispositional order accordingly. In all other respects, we affirm the judgment of the juvenile court.

FACTS

On May 16, 2006, eighteen-year-old Z.M. was in a high school band class and was laying down on his stomach signing a yearbook when he felt a sharp pain in his "butt[.]" Tr. p. 7. He turned over, discovered that B.R.M. was on top of him, and pushed B.R.M. off of

[1] Indiana Code § 35-42-2-1.5.

[2] I.C. § 35-42-2-1.

him. B.R.M. then raised up to a kneeling position and, holding a drumstick in both hands, "went down" on Z.M., driving the drumstick into Z.M.'s rectum with B.R.M.'s full body force. Id. at 8.

B.R.M. later told an investigating officer that he had "porked [Z.M.] in the rear." Id. at 57. Apparently, "porking" is a common activity among some band members and according to another student, "porking" is "usually not [violent], it's just, you know, just kind of poke them." Id. at 64. When asked by defense counsel if "porking" was normally intended to hurt someone, B.R.M. responded, "that's kind of hard to say. Sometimes no, but sometimes yes." Id. at 72.

Following the incident, Z.M. felt a level of pain that he had never experienced before. Later that afternoon, Z.M. went to a local hospital, where he learned that the drumstick had penetrated his jeans and poked a hole in his rectum. The injury would have been fatal if it had not been addressed appropriately. Z.M. was transported to a Cincinnati hospital for surgery later that night, and following the surgery, he was given a colostomy bag and a catheter. Z.M. had to use the catheter for a week and the colostomy bag for three months. He suffered a significant amount of pain and accumulated $80,000 in medical expenses.

On June 2, 2006, the State filed a petition alleging that B.R.M. was a delinquent child and had committed offenses that would have been aggravated battery, battery resulting in serious bodily injury, criminal deviate conduct, and receiving stolen property had they been committed by an adult. Prior to the hearing, the juvenile court granted the State's motion to dismiss the receiving stolen property allegation. On August 15, 2006, the juvenile court held

a hearing on the State's petition, after which it found that B.R.M. had committed acts that would have been aggravated battery and battery resulting in serious bodily injury had they been committed by an adult. The juvenile court found insufficient evidence supporting the criminal deviate conduct allegation. On August 29, 2006, the juvenile court awarded wardship of B.R.M. to the DOC for housing in a correctional facility for children. B.R.M. now appeals.

DISCUSSION AND DECISION

I. Double Jeopardy

We consider, sua sponte, whether the dual findings of aggravated battery and battery resulting in serious bodily injury violate the Double Jeopardy Clause of the Indiana Constitution.[3] Initially, we observe that it is well established that juvenile adjudications may implicate double jeopardy. D.B. v. State, 842 N.E.2d 399, 403 (Ind. Ct. App. 2006). Furthermore, our Supreme Court has concluded that

> two or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (emphases in original).

Turning immediately to the actual evidence test, we observe that "[u]nder this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts." Id. at 53. To succeed under this test,

there must be "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Id.

It is readily apparent that precisely the same set of evidentiary facts establishes the findings of both aggravated battery and battery causing serious bodily injury. Both findings are based on the same incident, i.e., B.R.M. "forc[ing] a drum stick inside the anus of [Z.M.]," which caused, among other things,

> serious permanent disfigurement, extreme pain, or permanent or protracted loss or impairment of the function of a bodily member or organ, to-wit: extreme pain, bleeding from anus, blood in urine, tear of rectum, damage to urethra, requiring surgery, a colostomy and a catheter . . . .

Appellant's App. p. 13-14. Thus, the dual findings violate double jeopardy principles.

"When two convictions are found to contravene the double jeopardy principles, a reviewing court may remedy the violation by reducing either conviction to a less serious form of the same offense if doing so will eliminate the violation. If it will not, one of the convictions must be vacated." Richardson, 717 N.E.2d at 54 (citations omitted). The reviewing court makes this determination. Id. Accordingly, we reverse the judgment of the juvenile court and direct it to vacate the battery causing serious bodily injury finding.

II. Sufficiency of the Evidence

B.R.M. argues that there is insufficient evidence supporting the juvenile court's aggravated battery finding. As we consider this argument, we observe that when the State

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[3] Article I, Section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for

seeks to have a juvenile adjudicated a delinquent, it must prove every element of the offense beyond a reasonable doubt. C.T.S. v. State, 781 N.E.2d 1193, 1200-01 (Ind. Ct. App. 2003). We neither reweigh the evidence nor judge the credibility of witnesses, looking instead to the evidence and the reasonable inferences that may be drawn therefrom that support the true finding. Id. We will affirm the adjudication if evidence of probative value exists from which the factfinder could have found the juvenile guilty beyond a reasonable doubt. Id.

To be successful on the delinquency petition herein, the State was required to establish beyond a reasonable doubt that B.R.M. knowingly or intentionally inflicted injury on Z.M. that caused serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ. I.C. § 35-42-2-1.5. A person engages in conduct "knowingly" if, when he engaged in the conduct, he was aware of a high probability that he was doing so. I.C. § 35-41-2-2(b). A person engages in conduct "intentionally" if, when he engaged in the conduct, it was his conscious objective to do so. Id. at § -2(a). Intent may be established by circumstantial evidence, including a defendant's actions and the natural and probable consequences thereof. Lush v. State, 783 N.E.2d 1191, 1196 (Ind. Ct. App. 2003). The "brutality of a defendant's actions" may be considered by the factfinder when determining whether the defendant knowingly or intentionally engaged in criminal conduct. Id.

B.R.M. essentially contends that he was "just horsing around" and that he did not intend to inflict injury on Z.M. Appellant's Br. p. 3. At the hearing, however, the State presented evidence that B.R.M. kneeled over an unsuspecting classmate, plunging a

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the same offense."

drumstick into Z.M.'s anus with such force that it penetrated Z.M.'s jeans and anus. Indeed, the force used was so severe that it pierced Z.M.'s rectum—a potentially fatal injury that required surgery and the insertion of a catheter and colostomy bag to repair. It is reasonable to infer from this evidence of B.R.M.'s brutality that he acted knowingly and/or intentionally. We conclude, therefore, that there is sufficient evidence supporting the juvenile court's finding that B.R.M. committed an act that would have been aggravated battery had it been committed by an adult.

III. Disposition

The determination of a specific disposition of a juvenile adjudicated a delinquent child is within the discretion of the trial court and we will reverse only if there has been an abuse of that discretion. C.C. v. State, 831 N.E.2d 215, 216 (Ind. Ct. App. 2005). The trial court's discretion is subject to statutory considerations concerning the welfare of the child, the safety of the community, and the policy favoring the least harsh disposition. Id. An abuse of discretion occurs when the trial court's determination is clearly erroneous and against the logic and effect of the facts and circumstances before it or the reasonable inferences that may be drawn therefrom. Id.

B.R.M. contends that the juvenile court erred by ordering that he be made a ward of the DOC for housing in a correctional facility for children. In particular, he directs our attention to Indiana Code section 31-37-18-6, which addresses the statutory factors to be considered in imposing a juvenile's disposition decree:

> If consistent with the safety of the community and the best interest of the child, the juvenile court shall enter a dispositional decree that:

(1) is:

(A) in the least restrictive (most family like) and most appropriate setting available; and

(B) close to the parents' home, consistent with the best interest and special needs of the child;

(2) least interferes with family autonomy;

(3) is least disruptive of family life;

(4) imposes the least restraint on the freedom of the child and the child's parent, guardian, or custodian; and

(5) provides reasonable opportunity for participation by the child's parent, guardian, or custodian.

Indiana has a policy favoring the least harsh disposition. D.P. v. State, 783 N.E.2d 767, 770 (Ind. Ct. App. 2003). If, however, the child is better served by a more restrictive placement, then such a disposition is permissible. C.C., 831 N.E.2d at 219.

Here, the record reveals that B.R.M. was previously adjudicated a delinquent in 2004 for an episode of theft, auto theft, and leaving home without permission of a parent, for which he received probation and home detention. Moreover, B.R.M. has amassed approximately forty-five disciplinary-related incidents at school over a two-year period. Twenty-six of those incidents occurred within approximately six months of his probation and home detention. Eight of those incidents involved inappropriate touching or striking of other students. In concluding that B.R.M. should be committed to the DOC, the juvenile court made the following remarks:

> I'm . . . particularly concerned about the pattern of behavior that was taking place at the school. . . . This behavior that has been exhibited in this case is extremely dangerous to others and it has to be corrected and it has to be corrected now. I do not want you to be in a position again,

> young man, of ruining the rest of your life, . . . and I'm going to make my best shot here today for you, young man, and for the parents, because I don't want you in this position again, either. . . . I do think that [commitment to the DOC] affords the best opportunity to correct the behavior that underlies the problem here . . . .

Appellant's App. p. 159-60.

B.R.M. characterizes his behavior toward Z.M. and in prior incidents at school and at home as "just horsing around," appellant's br. p. 3, a "prank," id. at 7, "nothing especially unusual for a teenage boy," id., and merely taking "his grandmother's car for a joy ride, without her permission," reply br. p. 4. Notwithstanding these attempts to minimize his actions and the consequences thereof, it is apparent that B.R.M. has engaged in a continuous pattern of escalating bad behavior. We take issue with B.R.M.'s statement that his behavior is not "especially unusual for a teenage boy," appellant's br. p. 7, inasmuch as the vast majority of teenage boys manage to avoid being disciplined forty-five times at school during a two-year period, taking a car without permission or a driver's license, and causing such severe injury to another classmate that the classmate was forced to have surgery, amass $80,000 in medical expenses, and use a colostomy bag for three months.

B.R.M. has failed to respond to less restrictive punishments in the past. He has exhibited disregard for rules, his fellow classmates, and the consequences of his actions. Under these circumstances, it is in the best interest of B.R.M. and of society that he be committed to the DOC to aid him in directing his behavior so that he will not later become a criminal. S.C. v. State, 779 N.E.2d 937, (Ind. Ct. App. 2002). Thus, we cannot say that the juvenile court abused its discretion in ordering that he be committed to the DOC.

Finally, we observe that the juvenile court relied, in part, on Indiana Code section 31-37-19-9 in ordering B.R.M. committed to the custody of the DOC. Appellant's App. p. 8. That statute applies only if the child was found delinquent for committing an act that would be murder, kidnapping, rape, criminal deviate conduct, or robbery. B.R.M. was not adjudicated on any of those acts. The State alleged that he committed an act that would be criminal deviate conduct if committed by an adult but, following the hearing, the juvenile court found insufficient evidence supporting that allegation. Consequently, it was erroneous for the juvenile court to rely on Indiana Code section 31-37-19-9 in determining the disposition of B.R.M.

It appears, however, that this error may have been harmless, inasmuch as the juvenile court did not impose a fixed term of wardship. Pursuant to Indiana Code section 31-37-19-6(2)(A), the other statute on which the juvenile court relied, the juvenile court may order wardship without a restriction on the length of the juvenile's placement with the DOC. The arguably harmless nature of the error notwithstanding, we believe the accuracy of a juvenile's record to be of the utmost importance. Thus, to ensure that B.R.M.'s record is accurate, we reverse the judgment of the juvenile court to the extent that it relied upon Indiana Code section 31-37-19-9 and direct it to amend the dispositional order accordingly.

The judgment of the juvenile court is affirmed in part, reversed in part, and remanded with instructions to vacate the finding of battery resulting in serious bodily injury and to delete the reference to Indiana Code section 31-37-19-9 in the dispositional decree.

FRIEDLANDER, J., and CRONE, J., concur.